Capital Case
No. 17-1107

IN THE
# Supreme Court of the United States

MIKE CARPENTER, WARDEN,
OKLAHOMA STATE PENITENTIARY,
*Petitioner*,

v.

PATRICK DWAYNE MURPHY,
*Respondent.*

**On Writ of Certiorari**
**to the United States Court of Appeals**
**for the Tenth Circuit**

## SUPPLEMENTAL BRIEF FOR RESPONDENT


IAN HEATH GERSHENGORN
ZACHARY C. SCHAUF
LEONARD R. POWELL
ANDREW B. CHERRY*
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
igershengorn@jenner.com

PATTI PALMER GHEZZI
*Counsel of Record*
EMMA ROLLS
MICHAEL LIEBERMAN
ASSISTANT FEDERAL
PUBLIC DEFENDERS
215 Dean A. McGee
Suite 707
Oklahoma City, OK 73102
(405) 609-5975
patti_p_ghezzi@fd.org

** Admitted only in California, not admitted in the District of Columbia. Practicing under the supervision of the partnership of Jenner & Block LLP.*

*Additional Counsel Listed on Inside Cover*

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK SUPREME
COURT AND APPELLATE
CLINIC AT THE UNIVERSITY
OF CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637

**CAPITAL CASE**

## QUESTIONS PRESENTED

(1) Whether any statute grants the state of Oklahoma jurisdiction over the prosecution of crimes committed by Indians in the area within the 1866 territorial boundaries of the Creek Nation, irrespective of the area's reservation status.

(2) Whether there are circumstances in which land qualifies as an Indian reservation but nonetheless does not meet the definition of Indian country as set forth in 18 U. S. C. §1151(a).

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iv

INTRODUCTION ..... 1

ARGUMENT ..... 3

I. The Court May Not Uphold Respondent's Death Sentence Based On Arguments The State Has Disavowed. ..... 3

II. No Statute Gives Oklahoma Jurisdiction To Prosecute Indians For Crimes On Reservations. ..... 4

A. When Congress Subjects Reservations To State Jurisdiction, It Speaks Clearly. ..... 5

B. Congress Did Not Subject Eastern Oklahoma's Reservations To State Criminal Jurisdiction. ..... 7

C. Post-Enactment Prosecutions Cannot Revise Jurisdictional Lines Congress Drew. ..... 12

III. Once Congress Establishes A Federal Reservation, It Remains "Indian Country" Under 18 U.S.C. § 1151(a) Until Congress Expressly Provides Otherwise ..... 15

A. The Phrase "Under The Jurisdiction Of The United States Government" Limits § 1151(a) To Federal Reservations. ..... 16

B. An Extant Federal Reservation Remains "Under The Jurisdiction Of The United States Government" Regardless Of Whether Federal Executive Officials Exercise Jurisdiction. ..... 20

C. The Court Should Not Resolve This Case Based On § 1151(a)..... 23

CONCLUSION ..... 26

## TABLE OF AUTHORITIES

CASES

*Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998) ..... 18-19, 23

*Bryan v. Itasca County*, 426 U.S. 373 (1976) ..... 16

*California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) ..... 23

*Carcieri v. Salazar*, 555 U.S. 379 (2009) ..... 17

*Cravatt v. State*, 825 P.2d 277 (Okla. Crim. App. 1992) ..... 4

*Cutler v. Wilkinson*, 544 U.S. 709 (2005) ..... 23

*Danforth v. Minnesota*, 552 U.S. 264 (2008) ..... 14

*DeCoteau v. District County Court for Tenth Judicial District*, 420 U.S. 425 (1975) ..... 23

*Donnelly v. United States*, 228 U.S. 243 (1913) ..... 17

*Duro v. Reina*, 495 U.S. 676 (1990) ..... 23

*Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978) ..... 20-21

*Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987) ..... 11

*Joplin Mercantile Co. v. United States*, 236 U.S. 531 (1915) ..... 22

*Mattz v. Arnett*, 412 U.S. 481 (1973) ..... 19, 24

*McClanahan v. Ariz. State Tax Commission*, 411 U.S. 164 (1973) ..... 5, 23-24

*Morris v. Tanner*, 288 F. Supp. 2d 1133 (D. Mont. 2003) ..... 25

*Morton v. Mancari*, 417 U.S. 535 (1974) ..... 1, 5

*Nebraska v. Parker*, 136 S. Ct. 1072 (2016) ..... 25

*Negonsott v. Samuels*, 507 U.S. 99 (1993) ..... 5, 13

*Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991) ..... 23

*Southern Surety Co. v. Oklahoma*, 241 U.S. 582 (1916) ..... 8, 11

*Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962) ..... 9, 19

*Solem v. Bartlett*, 465 U.S. 463 (1984) ..... 19

*State ex rel. May v. Seneca-Cayuga Tribe of Oklahoma*, 711 P.2d 77 (Okla. 1985) ..... 4

*State v. Klindt*, 782 P.2d 401 (Okla. Crim. App. 1989) ..... 4, 15

*United States v. Antelope*, 430 U.S. 641 (1977) ..... 5

*United States v. Birdsall*, 233 U.S. 233 (1914) ..... 22

*United States v. Bryant*, 136 S. Ct. 1954 (2016) ..... 5

*United States v. John*, 437 U.S. 634 (1978) ..... 5, 7, 18, 19, 21

*United States v. Kagama*, 118 U.S. 375 (1886) ..... 12

*United States v. Pelican*, 232 U.S. 442 (1914) .... 17, 18

*United States v. Ramsey*, 271 U.S. 467 (1926)..... 7, 9

*United States v. Rodgers*, 466 U.S. 475 (1984)..... 16

*United States v. Sands*, 968 F.2d 1058 (10th Cir. 1992)..... 1, 4, 9, 15

*Ex parte Webb*, 225 U.S. 663 (1912) ..... 9, 22

**STATUTES**

6 U.S.C. § 601 ..... 24

10 U.S.C. § 284 ..... 24

15 U.S.C. § 375 ..... 24

15 U.S.C. § 632 ..... 24

15 U.S.C. § 1175 ..... 24

15 U.S.C. § 1243 ..... 24

15 U.S.C. § 1245 ..... 24

16 U.S.C. § 3371 ..... 24

18 U.S.C. § 1151(a)..... 21

18 U.S.C. § 1151 note (2011)..... 18

18 U.S.C. § 1162(c)..... 25

18 U.S.C. § 1162(d)..... 25

18 U.S.C. § 1164 ..... 24

18 U.S.C. § 1460 ..... 24

18 U.S.C. § 2252 ..... 24

18 U.S.C. § 2266 ..... 24

18 U.S.C. § 2346 ..... 24

25 U.S.C. § 1304 ..... 24

25 U.S.C. § 1323 ..... 25
25 U.S.C. § 1616e-1 ..... 24
25 U.S.C. § 1903 ..... 24
25 U.S.C. § 2801 ..... 24
25 U.S.C. § 2802 ..... 24
25 U.S.C. § 2804 ..... 24
25 U.S.C. § 3202 ..... 24
25 U.S.C. § 4303 ..... 24
25 U.S.C. § 5129 ..... 17
28 U.S.C. § 1442 ..... 24
28 U.S.C. § 1738B ..... 24
33 U.S.C. § 1377 ..... 24
33 U.S.C. § 1377(h)(1) ..... 16
33 U.S.C. § 2269 ..... 24
34 U.S.C. § 12291 ..... 24
34 U.S.C. § 12511 ..... 24
42 U.S.C. § 608 ..... 24
42 U.S.C. § 6945 ..... 24
42 U.S.C. § 10101 ..... 24
42 U.S.C. § 10137 ..... 24
42 U.S.C. § 10138 ..... 24
49 U.S.C. § 40128 ..... 24
Act of Mar. 3, 1885, ch. 341, 23 Stat. 362 ..... 7

Act of Feb. 22, 1889, ch. 180, 25 Stat. 676 ..... 9

Act of May 2, 1890, ch. 182, 26 Stat. 81 ..... 11

Act of June 7, 1897, ch. 3, 30 Stat. 62 ..... 11

Act of June 16, 1906, ch. 3335, 34 Stat. 267 ..... 9

Act of Mar. 4, 1907, ch. 2911, 34 Stat. 1286 ..... 8

Act of Apr. 30, 1908, ch. 153, 35 Stat. 70 ..... 22

Act of Mar. 3, 1909, ch. 263, 35 Stat. 781 ..... 22

Act of June 28, 1932, ch. 284, 47 Stat. 336 ..... 18

Act of May 31, 1946, ch. 279, 60 Stat. 229 ..... 6

Act of June 30, 1948, ch. 759, 62 Stat. 1161 ..... 6

Act of July 2, 1948, ch. 809, 62 Stat. 1224 ..... 6

Act of Oct. 5, 1949, ch. 604, 63 Stat. 705 ..... 6

Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (1953) ..... 6

Act of Oct. 10, 1980, 94 Stat. 1785 ..... 25

Indian Reorganization Act, 48 Stat. 984, codified at 25 U.S.C. § 5129 ..... 17

Rev. Stat. § 2145 ..... 7

**LEGISLATIVE MATERIALS**

40 Cong. Rec. 2977 (1906) (Sen. McCumber) ..... 2, 22

*Hearings on S. 2755 and S. 3645 Before the S. Comm. on Indian Affairs*, 73d Cong., 2d Sess. (1934) ..... 17

*Hearings on S. 1683 Before S. Subcomm. on Interior and Insular Affairs*, 80th Cong., 2d Sess. (1948) ..... 12

H.R. Rep. No. 72-1446 (1932) ..... 18

H.R. Rep. No. 79-2032 (1946) ..... 12

H.R. Rep. No. 80-2356 (1948) ..... 12

S. Rep. No. 72-746 (1932) ..... 18

S. Rep. No. 76-1523 (1939) ..... 12

S. Rep. No. 83-699 (1953), *as reprinted in* 1953 U.S.C.C.A.N 2409 ..... 10

**OTHER AUTHORITIES**

*Cohen's Handbook of Federal Indian Law* (Nell Jessup Newton eds. 2012) ..... 13, 16

Mark R. Scherer, *Imperfect Victories: The Legal Tenacity of the Omaha Tribe* (1999) ..... 13

U.S. Census, State Recognized American Indian Reservations 2010 Census Block Maps, https://www.census.gov/geo/maps-data/maps/block/2010/aianhh/dc10blk_air_state.htm ..... 17

U.S. Dep't of Interior Solicitor's Opinion M-37029 (Mar. 12, 2014) ..... 21

*Webster's New International Dictionary* (1932) ..... 16, 20

## INTRODUCTION

If the Creek reservation endures, then it is "Indian country," and the federal government has exclusive jurisdiction to prosecute major crimes involving Indians on the reservation. The relevant statutes foreclose, in their text, any other result.

The Court's first Supplemental Question tees up the argument made by the Solicitor General, an argument "frequently raised, but never accepted." *United States v. Sands*, 968 F.2d 1058, 1061 (10th Cir. 1992). The consensus is correct. The Major Crimes Act applies to "any State," with no textual exception for Oklahoma. And while Congress has transferred criminal jurisdiction to States repeatedly over the years, it has always done so unambiguously. That is as it should be. Jurisdiction over Indians on reservations is a traditionally federal domain, stemming from the federal government's "plenary power" over Indian affairs "drawn both explicitly and implicitly from the Constitution itself." *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974). Clarity thus is essential before this Court concludes that Congress has taken federal jurisdiction and given it to States. Such clarity is absent here. Indeed, the text of the relevant statutes confirms that the Major Crimes Act applied in Oklahoma after statehood, as it applied in every other State. The United States' contrary argument reflects the same approach to statutory construction—based on storytelling, not text—that the State and the United States invoked to address disestablishment.

Nor does the Court's second Supplemental Question provide an alternative path to State criminal

jurisdiction. Section 1151(a) defines "Indian country" to include "any reservation under the jurisdiction of the United States Government." That definition excludes reservations established and recognized only by States. But when Congress establishes a reservation, it is under federal jurisdiction, and remains Indian country, until Congress says otherwise. The Executive Branch cannot change that. For the same reasons that only Congress can disestablish a reservation that Congress has established, only Congress can remove from the "jurisdiction of the United States Government" a reservation that Congress placed under that jurisdiction. That rule applies with particular force here, where Congress *rejected* proposals of the Executive Branch that would have removed the Creek reservation from the jurisdiction of the United States, leaving it to "be controlled by the new State." 40 Cong. Rec. 2977 (1906) (Sen. McCumber); *see* Resp. Br. 13, 42. Any alternative approach would embroil courts in disruptive, reservation-by-reservation litigation to decide whether a particular reservation is sufficiently under "the jurisdiction of the United States Government" to remain Indian country.

Regardless, no answer to the Supplemental Questions permits the Court to reverse the Tenth Circuit's decision *in this case*. The Court cannot uphold Respondent's capital sentence based on arguments the State never raised and—indeed—disavowed. So while an affirmative answer to one or both Supplemental Questions might limit relief for other defendants, the Tenth Circuit's decision here must stand.

## ARGUMENT

### I. The Court May Not Uphold Respondent's Death Sentence Based On Arguments The State Has Disavowed.

Regardless of the Court's answers to the Supplemental Questions, or the impact on other defendants, the Tenth Circuit's judgment must be affirmed. The State failed to preserve any argument besides its disestablishment argument, and it *disavowed* the argument that it could exercise criminal jurisdiction even if the Creek reservation endured. In the Tenth Circuit, the State relied on disestablishment alone to argue that Respondent's "conviction must stand." State 10th Cir. Br. 94. At the petition stage, the State raised no additional argument, even when the United States offered alternative grounds for reversal. Then, in its opening merits brief, the State contended that "[i]f the territory of the Creek Nation were a reservation, ... none of the[] convictions" obtained by state courts for qualifying crimes after 1907 "would have been valid." Pet'r Br. 43. And in reply, the State doubled down: After noting the argument that "Oklahoma had jurisdiction to try Indians in the former Indian Territory even if the area were one giant reservation," the State reaffirmed that "Oklahoma has not pressed that argument." State Reply 13.

Holding the State to its litigation choices is particularly appropriate here. First, its disavowal was intentional and express. Oklahoma not only disclaimed alternative arguments but provided three reasons for doing so. *Id.* at 13-14. Second, and more important,

Oklahoma's disclaimer reflected a tactical judgment to try to *prevent* the Court from reaching a "compromise," such as holding that Oklahoma retained criminal jurisdiction while leaving the reservation question for later. *See id.* (noting such a holding "would do nothing to ameliorate uncertainty caused by the decision below"). Having made the tactical judgment to invoke solely its reservation argument, Oklahoma cannot now claim entitlement to execute Respondent based on arguments it abandoned.

## II. No Statute Gives Oklahoma Jurisdiction To Prosecute Indians For Crimes On Reservations.

The United States has long argued that Congress granted "Oklahoma jurisdiction over the prosecution of crimes committed by Indians" in Eastern Oklahoma, "irrespective of ... reservation status." Order 1; *see* U.S. Merits Br. 28-33. But for decades, courts have rejected that argument.[1] For good reason. Echoing the State's reliance on the "'overall thrust' of congressional action" to analyze disestablishment, Pet'r Br. 52, the United States asks the Court to infer a shift of jurisdiction away from the federal government and to the State based on four statutes it deems "especially significant," U.S. Merits Br. 28, even though no text effects that result.

---

[1] *Cravatt v. State*, 825 P.2d 277, 279 (Okla. Crim. App. 1992); *State v. Klindt*, 782 P.2d 401, 403-04 (Okla. Crim. App. 1989); *State ex rel. May v. Seneca-Cayuga Tribe of Okla.*, 711 P.2d 77, 81 & n.17 (Okla. 1985); *see Sands*, 968 F.2d at 1061-63. Although these cases concerned restricted allotments, nothing in the United States' theory distinguishes restricted allotments from reservation lands.

That nontextual approach is wrong for disestablishment, and wrong for jurisdiction.

### A. When Congress Subjects Reservations To State Jurisdiction, It Speaks Clearly.

States generally lack jurisdiction to prosecute crimes concerning Indians on reservations. *United States v. Bryant*, 136 S. Ct. 1954, 1960 (2016). That rule derives from at least two sources. First is the "deeply rooted" principle that Indians on reservations are "free from state jurisdiction and control." *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 168 (1973) (quotation marks omitted). Second is the jurisdiction Congress has conferred on the *federal* government in statutes like the Major Crimes Act and General Crimes Act, as a manifestation of the "federal guardianship" over Indian tribes, *United States v. Antelope*, 430 U.S. 641, 647 n.8 (1977), and the federal government's "plenary power" over "the special problems of Indians," *Morton*, 417 U.S. at 551; *see United States v. John*, 437 U.S. 634, 651 (1978). As elsewhere, Congress can take away the federal government's jurisdiction and abrogate tribal rights—but only if "Congress has expressly provided" as much. *McClanahan*, 411 U.S. at 170-71.

Hence, when Congress transfers criminal jurisdiction to States, its statutes are bell-clear. In 1940, Congress did so in Kansas, enacting what this Court described as "the first major grant of jurisdiction to a State over offenses involving Indians committed in Indian country." *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993).

> Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations ... to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State....

*Id.* (quoting Act of June 8, 1940, ch. 276, 54 Stat. 249 (codified at 18 U.S.C. § 3243)). Statutes with near-identical language quickly followed for North Dakota, Iowa, New York, and California's Agua Caliente reservation. *See* Act of May 31, 1946, ch. 279, 60 Stat. 229; Act of June 30, 1948, ch. 759, 62 Stat. 1161; Act of July 2, 1948, ch. 809, 62 Stat. 1224; Act of Oct. 5, 1949, ch. 604, 63 Stat. 705. Thereafter, Congress did the same thing in gross in Public Law 280, granting exclusive criminal jurisdiction to six more States (California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska) and giving any *other* State the option to assume such jurisdiction. Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, §§ 2, 7, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162) ("Pub. L. 280").[2] Congress again left nothing to guesswork, specifying that each State "shall have jurisdiction over offenses committed by or against Indians in [designated] areas of Indian country." *Id.* § 2. Congress thus knew exactly how to do what the United States *says* Congress did in Oklahoma.

---

[2] A 1968 amendment made subsequent assumptions of jurisdiction subject to tribal consent. Pet. App. 72a.

### B. Congress Did Not Subject Eastern Oklahoma's Reservations To State Criminal Jurisdiction.

The United States' theory is that, notwithstanding *Negonsott*, Congress in 1906 in fact gave Oklahoma the "first major grant" of criminal jurisdiction over reservations. The text, however, says otherwise.

The Major Crimes Act is unambiguous. At statehood, the Act applied without exception to provide federal jurisdiction—"pre-emptive of state jurisdiction," *John*, 437 U.S. at 651—over qualifying crimes "commit[ed] ... within the boundaries of any State of the United States" and "within the limits of any Indian reservation." Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362. The General Crimes Act, too, applied in Oklahoma's "Indian country." Rev. Stat. § 2145; *see United States v. Ramsey*, 271 U.S. 467, 469 (1926) (federal "authority in respect of crimes committed by or against Indians continued after the admission of the state as it was before," including "under section 2145").

Hence, the United States must show that some *other* statute repealed the Major Crimes Act (and General Crimes Act) as to Oklahoma. But Congress knows how to transfer federal criminal jurisdiction to the States, *supra* 5-6, and no such clear language appears in any of the statutes the United States identifies.

Start with the Enabling Act. Had Congress repealed the Major Crimes Act and eliminated federal criminal jurisdiction in the State of Oklahoma, the Enabling Act was the place to do it. But far from treating Oklahoma

*differently* than any other State, it treated Oklahoma *the same*.

As to pending cases, Congress specifically amended the Enabling Act to confirm that Oklahoma would be like all other States: "[p]rosecutions for all crimes and offenses committed within the ... Indian Territory ... *which, had they been committed within a State, would have been cognizable in the Federal courts*, shall be transferred to and proceeded with in the United States circuit or district court." Act of Mar. 4, 1907, ch. 2911, 34 Stat. 1286, 1287 (emphasis added). Hence, the criminal jurisdiction of courts in the new State "was to be the same [as if] the Indian Territory [had] been a State when the offenses were committed." *S. Surety Co. v. Oklahoma*, 241 U.S. 582, 586 (1916).

Likewise, for new cases, nothing in the Enabling Act repealed the Major Crimes Act (or the General Crimes Act) in Eastern Oklahoma. *Cf.* U.S. Merits Br. 31 ("repeals by implication are not favored" (quoting *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007)). Far from giving Oklahoma uniquely broad jurisdiction, the Enabling Act's text preserved the divisions between state and federal jurisdiction that applied everywhere.

That is clear, first, from Section 13, on which the United States principally relies. The United States suggests the Enabling Act "extended the territorial laws in force in the Oklahoma Territory over the entire State," including Indian reservations. U.S. Merits Br. 29. But that is not what Section 13 does. Instead, when

Congress applied "the laws in force in the Territory of Oklahoma" as the default law for the new State, it did so with the caveat—ignored by the United States—that Oklahoma territorial law governed only "as far as applicable." Act of June 16, 1906, ch. 3335, § 13, 34 Stat. 267. This caveat practically shouts that Congress was not extending state law to anywhere it normally would *not* apply, including crimes concerning Indians on reservations. Indeed, the language the United States cites in the Enabling Act is the same language Congress used in the enabling act for Montana, Washington, North Dakota, and South Dakota, which provided that the default post-statehood law would be the "laws in force made by said Territories." Act of Feb. 22, 1889, ch. 180, § 24, 25 Stat. 676, 683. No one has ever thought this provision transferred to States criminal jurisdiction over Indian crimes on reservations. *Cf. Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 352 (1962) (Major Crimes Act prosecution in Washington).

The Enabling Act's other provisions confirm the point. Section 1 forbade Oklahoma's constitution from "limit[ing] or impair[ing] the rights of person or property pertaining to the Indians," or from limiting federal authority "to make any law or regulation respecting such Indians, their lands, property, or other rights." This Court interpreted that caveat to preserve not just forward-looking power, but "established [federal] laws and regulations" concerning Indians. *Ex parte Webb*, 225 U.S. 663, 683 (1912); *see Ramsey*, 271 U.S. at 469; *see also Sands*, 968 F.2d at 1062 (chiding the government's "construction of the Oklahoma Enabling

Act" as "ignor[ing] § 1"). Then, Section 3 required Oklahoma to "forever disclaim all right" to "all lands ... owned or held by any Indian, tribe, or nation." And finally, Section 21 confirmed that "the laws of the United States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States." These are not the words of a statute that, for the first time, shifted criminal jurisdiction over reservations from the federal government to States.[3]

Now consider the pre-statehood enactments. They did not provide that *if* the Indian Territory became a State, the new State would be exempt from the Major Crimes Act and its exclusive federal jurisdiction over reservations in "any State." To contend otherwise, the United States relies on the extension of "Arkansas law" in the Indian Territory to all persons "'irrespective of race.'" U.S. Merits Br. 28-29 (quoting Act of June 7, 1897, ch. 3, 30 Stat. 62, 83 ("1897 Act")). But for two reasons, that does not support the United States' position.

First, even insofar as Congress made this Arkansas law applicable to Indians, that is nothing like subjecting Indians on reservations to *state* jurisdiction. Congress merely identified "Mansfield's Digest of the Statutes of Arkansas" as the rules to apply as "incorporated"

---

[3] Reinforcing this point, the Senate Report to Public Law 280 identified, as a "legal impediment[] to the transfer of jurisdiction over Indians on their reservations," the state constitutional provisions required by these enabling act disclaimers (including for "Oklahoma"). S. Rep. No. 83-699, at 7 (1953), *as reprinted in* 1953 U.S.C.C.A.N 2409, 2414.

"federal law." *Indian Country, U.S.A., Inc. v. Okla. ex rel. Okla. Tax Comm'n*, 829 F.2d 967, 975 & n.3 (10th Cir. 1987); *see* Act of May 2, 1890, ch. 182, § 33, 26 Stat. 81 ("1890 Act"). These criminal laws were chosen by Congress, were enforced by prosecutions "in the name of the 'United States,'" 1890 Act § 32, and were adjudicated in "United States Courts" created and controlled by Congress, *S. Surety*, 241 U.S. at 584; *see* 1897 Act, 30 Stat. at 83. That is far from subjecting Indians on reservations to *state* legislatures, prosecutors, and courts.

Second, the United States implies that when Congress directed the application of Arkansas law, it *displaced* federal laws. Not so. When Congress gave the pre-statehood courts jurisdiction "irrespective of race," it empowered them to apply two sets of laws: "*the laws of the United States* and the State of Arkansas in force in the Territory." 1897 Act, 30 Stat. at 83 (emphasis added). If general federal law and Arkansas law defined the same offense, federal definitions "govern[ed]." 1890 Act § 33.

The United States fares no better by suggesting that the abolition of *tribal* courts in 1897, in favor of "United States Courts" established by the federal government, somehow eliminated *federal* jurisdiction and transferred it to Oklahoma in 1907. U.S. Merits Br. 28-29. That argument mistakenly assumes that Congress's actions against the *Nation* somehow divested jurisdiction from the *federal government*. But federal Indian law from the start reflected a desire to aggregate tribal power *and* federal power to insulate tribes from the pressures of

(often hostile) States. *See, e.g., United States v. Kagama*, 118 U.S. 375, 384 (1886) (noting federal government's "duty of protection" over Indians from "the people of the states ... [who] are often [the tribes'] deadliest enemies"). It is a nonsequitur to view a reduction of *tribal* authority as transferring *federal* authority.

Finally, the United States' assertion of a jurisdictional gap—that tribal courts were not available to prosecute minor Indian-on-Indian crimes—says nothing about congressional intent. As Respondent has explained, tribal courts nationwide were often absent or ineffective, yielding the same gap. Resp. Br. 48-49. That problem, when identified, was solved by BIA courts, *see id.*, or express jurisdictional transfers—like the Kansas Act, which Congress enacted when informed that there were "no tribal courts," and that Kansas was prosecuting "all minor offenses" in prosecutions of doubtful "legality." S. Rep. No. 76-1523, at 2 (1939). Similar gaps motivated the transfers in North Dakota, Iowa, and New York. H.R. Rep. No. 79-2032, at 2 (1946); H.R. Rep. No. 80-2356, at 1, 3 (1948); *Hearings on S. 1683 Before S. Subcomm. on Interior and Insular Affairs*, 80th Cong., 2d Sess. 3 (1948). The solution was not to judicially imply wholesale transfers of criminal jurisdiction from the federal government to the States.

### C. Post-Enactment Prosecutions Cannot Revise Jurisdictional Lines Congress Drew.

The United States claims that Congress *must* have intended to shift jurisdiction to Oklahoma because "state

courts regularly exercised that jurisdiction," without objection from the federal executive. U.S. Merits Br. 32. But this *Solem* Step 3 evidence fails to persuade in the disestablishment analysis, and it is no more persuasive in jurisdictional garb. Just as only Congress can disestablish, only Congress—not unnamed state and federal officials—can transfer criminal jurisdiction from the federal government and tribes to the States.

To the extent the United States claims these prosecutions shed light on *Congress's* intent, this post-enactment evidence—never a sound guide to statutory meaning—is especially unpersuasive because, in this era, States nationwide routinely exercised criminal jurisdiction over Indian reservations that Congress never conferred. Kansas exercised "jurisdiction over all offenses committed on Indian reservations." *Negonsott*, 507 U.S. at 106-07. Nebraska also "erroneously exercis[ed] criminal jurisdiction ... for some seventy years." Mark R. Scherer, *Imperfect Victories: The Legal Tenacity of the Omaha Tribe, 1945-1995*, 15-17 (1999). New York, too, "regularly exercised or claimed the right to exercise jurisdiction over the New York reservations." *Cohen's Handbook of Federal Indian Law* § 6.04[4][a] at 578 (Nell Jessup Newton eds. 2012) ("*Cohen's*"). Washington and South Dakota did the same. Resp. Br. 46.

Indeed, the Department of Interior memorandum annexed to the United States' merits brief describes how, in the first half of the 20th century,

> several States had asserted civil and criminal

> jurisdiction in Indian country ..., despite the fact that no Federal statutes of relinquishment and transfer had been enacted[,] [including] Michigan, Oklahoma, North Carolina, and Florida. Jurisdiction was also been asserted [sic] by certain counties in such States as Washington, Nevada, and Idaho.... Officials of both Oklahoma and North Carolina have contended in letters to this Department that they have criminal jurisdiction over the Indians of their States irrespective of the fact that they do not have such jurisdiction under a specific Federal statute....

U.S. Merits Br. 7a-8a. The precise reason for this practice is unclear. In Oklahoma no case addressed the issue for three decades after statehood. But whatever the reason, with States routinely asserting criminal jurisdiction Congress never provided, the Court can infer nothing from state prosecutions on the Creek reservation.

Finally, concerns over the impact of affirmance on other convictions is misplaced. Federal habeas claims are sharply limited under AEDPA—the Tenth Circuit has already rejected attempts to file successive petitions based on "*Murphy*" claims. Br. in Opp. 33. And state courts have at least as much flexibility to limit the claims available on state collateral review. *Danforth v. Minnesota*, 552 U.S. 264, 276 (2008).[4] Thus, even were

---

[4] Respondent understands that the Creek Nation intends to address this issue in greater detail.

such considerations a legitimate aspect of statutory interpretation, they would not support the United States' position.

* * *

As Oklahoma's state and federal courts have held for decades, "Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country," *Klindt*, 782 P.2d at 403, and the "enactments relied on by the [federal] government did not abrogate the federal government's authority and responsibility, nor allow jurisdiction by the State of Oklahoma," *Sands*, 968 F.2d at 1062. The Court should not now revive the United States' atextual jurisdictional theory.

## III. Once Congress Establishes A Federal Reservation, It Remains "Indian Country" Under 18 U.S.C. § 1151(a) Until Congress Expressly Provides Otherwise.

Section 1151(a) defines "Indian country" to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." So an Indian reservation fails to qualify as "Indian country" *only* when it is not "under the jurisdiction of the United States Government"—for example, a *state* reservation. But reservations established by Congress are, by definition, established "under the jurisdiction of the United States Government." And they remain "under" that jurisdiction until Congress disestablishes them—because only Congress can divest land of its Indian country status. Recognizing a previously unknown

category of federal reservations that are not "Indian country" would violate § 1151(a)'s plain text, depart from this Court's precedent, unsettle established jurisdictional understandings, and enmesh courts in decades of litigation.

### A. The Phrase "Under The Jurisdiction Of The United States Government" Limits § 1151(a) To Federal Reservations.

For a reservation to be "under the jurisdiction of the United States Government," it must be a *federal* reservation established by the federal government. As the leading Indian law treatise explains, the phrase "under the jurisdiction of the United States Government" "was likely added to exclude from the scope of the statute Indian reservations governed by certain states and thus not under federal protection." *Cohen's* § 3.04 at 191 (internal quotation marks omitted); *cf. Bryan v. Itasca Cty.*, 426 U.S. 373, 375-76 (1976) (describing states' limited power over "reservation Indians ... on federally established reservations"); 33 U.S.C. § 1377(h)(1) (equating "Federal Indian reservation" with § 1151(a)'s definition).

That conclusion follows from the statute's plain text. The word "jurisdiction" means the "[a]uthority of a sovereign power to govern or legislate" or "to exercise authority" or "control." *Webster's New International Dictionary* 1173 (1932); *see United States v. Rodgers*, 466 U.S. 475, 479 (1984) (the "most natural, nontechnical reading" of "jurisdiction" "is that it covers all matters confided to" an authority and all "'territory within which any particular power may be exercised'" (quotation

marks omitted)). So a reservation "under" the jurisdiction of the "United States Government" is one the federal government has placed under its "sovereign power to govern or legislate." The federal government has, by definition, done so for federal reservations. But other Indian reservations are recognized only by States. U.S. Census, State Recognized American Indian Reservations 2010 Census Block Maps, https://www.census.gov/geo/maps-data/maps/block/2010/aianhh/dc10blk_air_state.html (last visited Dec. 20, 2018). The phrase "under the jurisdiction of the United States Government" ensures that only federal reservations are "Indian country."[5]

Once Congress creates a federal reservation, however, it remains "Indian country" until Congress disestablishes it. This Court has long held that "nothing can more appropriately be deemed 'Indian country,' ... than a tract of land ... lawfully set apart as an Indian reservation." *Donnelly v. United States*, 228 U.S. 243, 269 (1913). Likewise, in *United States v. Pelican*, 232

---

[5] The same conclusion follows from the phrase "tribe now under Federal jurisdiction" in the 1934 Indian Reorganization Act ("IRA"). Indian Reorganization Act § 5, 48 Stat. 984, codified at 25 U.S.C. § 5129; *see Carcieri v. Salazar*, 555 U.S. 379, 381-82 (2009). In *Carcieri*, neither the parties nor the Court questioned the federal government's interpretation that the phrase "under Federal jurisdiction" carved out tribes "under the jurisdiction of ... States." 555 U.S. at 382, 384; *see id.* at 399 (Breyer, J., concurring). The legislative history likewise shows the phrase was added to exclude members of state-recognized tribes unless they satisfied the IRA's separate blood-quantum provision. *Hearings on S. 2755 and S. 3645 Before the S. Comm. on Indian Affairs*, 73d Cong., 2d Sess. 263-65 (1934); 25 U.S.C. § 5129.

U.S. 442 (1914), the Court explained that the "Colville Reservation, set apart by Executive order ..., and repeatedly recognized by acts of Congress, was a legally constituted reservation," and "[*a*]*s such* ... was included in ... 'Indian country.'" *Id.* at 445 (emphasis added) (footnote and internal quotation marks omitted). The land could lose that status, the Court continued, only if "the reservation was diminished." *Id.*

That remains the law under § 1151(a). That provision's reference to "reservations" stems from the 1885 Major Crimes Act, and the phrase "under the jurisdiction of the United States Government" first appeared in a 1932 amendment clarifying that the statute covered qualifying crimes on "rights of way running through [a] reservation." Act of June 28, 1932, ch. 284, 47 Stat. 336, 337. There is no evidence that Congress intended this phrase to dislodge this Court's understanding in *Donnelly* and *Pelican* that all still-existing reservations remain "Indian country." *Cf.* H.R. Rep. No. 72-1446 (1932) (no mention of this phrase); S. Rep. No. 72-746 (1932) (same).

Congress also did not effect that sea change when, in 1948, it borrowed the Major Crimes Act's definition as part of § 1151's codification of the "Indian country" definition. The statute's Historical and Revision Notes confirm that its definition was "based on [the] latest construction of the term by the United States Supreme Court"—citing, specifically, *Donnelly* and *Pelican*. 18 U.S.C. § 1151 note (2011); *see John*, 437 U.S. at 648 (§ 1151(a)'s "definition was based on several decisions of this Court interpreting the term"); *Alaska v. Native*

*Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 530 (1998) (similar). In so doing, Congress embraced the "more expansive scope" of the term "Indian country" used in those cases, rather than the "more technical and limited definition" found in "[s]ome earlier" 19th-century cases. *John*, 437 U.S. at 649 n.18.

Likewise, this Court has continued to treat extant federal reservations as—by definition—"Indian country." *Solem v. Bartlett*, 465 U.S. 463, 467 (1984) ("If the relevant surplus land act did not diminish the existing Indian reservation," then "the entire opened area is Indian country under 18 U.S.C. § 1151(a)."); *Mattz v. Arnett*, 412 U.S. 481, 506 (1973) ("We conclude that the Klamath River Reservation was not terminated ..., and that the land within the boundaries of the reservation is still Indian country, within the meaning of 18 U.S.C. § 1151."); *Seymour*, 368 U.S. at 353-54 (question was whether land is "part of an Indian reservation *and therefore* Indian country within the meaning of §§ 1151 and 1153" (emphasis added)). *Mattz* did so even though it concerned a California reservation subject to Public Law 280's transfer of federal criminal jurisdiction. 412 U.S. at 483 n.1. Indeed, Respondent has found *no* case holding that a still-existing federal reservation is not Indian country.

### B. An Extant Federal Reservation Remains "Under The Jurisdiction Of The United States Government" Regardless Of Whether Federal Executive Officials Exercise Jurisdiction.

A reservation does not cease to be "under the jurisdiction of the United States Government," and hence "Indian country," simply because executive officials fail to exercise jurisdiction Congress has conferred. *Cf.* Pet'r Br. 39-42; U.S. Merits Br. 30. Such nonenforcement does not change the dispositive fact: The federal government placed the reservation under its "sovereign power to govern or legislate." *Webster's*, *supra*, at 1173. So the reservation remains "under the jurisdiction of the United States Government" until Congress disestablishes it.

Any other rule is *Solem* Step 3 by a different name. The special rules that apply to Indian reservations largely do so because reservations are "Indian country" under § 1151—a definition that governs not just criminal prosecutions, but civil jurisdiction and statutory rights. *Infra* at 23-24 & nn.7-8. So just as only Congress can disestablish, only Congress can divest land of its Indian country status.

Here, it would be particularly inappropriate to accord weight to federal executive action. When Congress preserved the Creek government (and thus the Creek reservation) in Section 28 of the Five Tribes Act, it did so "over the strenuous objections of" the federal executive. *Harjo v. Kleppe*, 420 F. Supp. 1110,

1130 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978). The executive's campaign of "bureaucratic imperialism," *id.*—designed to frustrate the laws Congress had passed—cannot remove the Creek reservation from federal jurisdiction.

This Court rejected a similar argument in *John*—a post-1948 Major Crimes Act case addressing federal jurisdiction under § 1151(a). Mississippi argued that, because "the Federal Government long ago abandoned its supervisory authority" over "Choctaws residing in Mississippi," there was no "basis for federal jurisdiction." 437 U.S. at 652. This Court disagreed, explaining that "the fact that federal supervision ... has not been continuous" does not "destroy[] the federal power to deal with them." *Id.* at 653. So too here, any gaps in the Executive Branch's supervision cannot destroy the "jurisdiction of the United States Government." 18 U.S.C. § 1151(a). Only Congress can.[6]

Even if something short of disestablishment could remove a reservation from the "jurisdiction of the United States Government," Congress—before statehood and after—continued federal jurisdiction over the Creek reservation. In the Five Tribes Act, Congress acted to preserve the Creek, Resp. Br. 11, precisely so the federal government would not "let go of our

---

[6] After *Carcieri*, the Interior Department reached a similar conclusion regarding the IRA's "under federal jurisdiction" requirement: "[E]vidence of executive officials disavowing legal responsibility ... cannot, in itself, revoke jurisdiction absent express congressional action." U.S. Dep't of Interior Solicitor's Opinion M-37029, at 20 (Mar. 12, 2014).

authority" and "control over the property of those Indians." 40 Cong. Rec. 2977 (Sen. McCumber). Then in Section 1 of the Enabling Act, Congress specified that statehood would not "limit or affect the authority of the Government of the United States" over Indians. Congress subjected allotted reservation lands to restrictions on alienation that could be lifted only by the federal government, leaving 85% of lands in Eastern Oklahoma inalienable at statehood and still *half* after 1908, Resp. Br. 3, 13, 36 & n.5—while recognizing that the federal government remained "under a duty to the inhabitants of the Indian Territory different from its duty to the inhabitants of" Western Oklahoma. *Webb*, 225 U.S. at 686. And in 1909, Congress sought the Creek legislature's approval of its equalization of allotments on the Creek reservation. Act of Mar. 3, 1909, ch. 263, 35 Stat. 781, 805. These badges mark the continuing federal jurisdiction that Congress never lifted from the reservation.

Indeed, for all its hostility, even the federal executive continued to treat the Creek reservation as under federal jurisdiction in statehood's aftermath. Prosecutors indicted liquor offenses premised on the Creek reservation remaining "Indian country." *See, e.g.*, *Joplin Mercantile Co. v. United States*, 236 U.S. 531, 548 (1915). Meanwhile, the BIA kept its Indian agents on the ground running tribal schools on the reservation; BIA police maintained law and order; and Interior Department maps showed the Creek reservation. Act of Apr. 30, 1908, ch. 153, 35 Stat. 70, 91; *United States v. Birdsall*, 233 U.S. 233 (1914); J.A. 89-117. Whatever the scope of BIA supervision over time, the Executive

Branch's actions in the wake of statehood reflect continuation of federal supervision, not its termination.

### C. The Court Should Not Resolve This Case Based On § 1151(a).

Merits aside, the Court should not resolve this case by narrowing § 1151(a) to exclude some ill-defined and still-to-be-determined set of federal reservations. To Respondents' knowledge, no court has ever weighed such an interpretation—certainly, the Tenth Circuit did not. This Court is mindful that it is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). That caution is always wise, and especially so here, where narrowing § 1151(a) would launch years of reservation-by-reservation litigation, with broad and unpredictable effects far beyond Oklahoma.

"While 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction." *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 427 n.2 (1975); *see Duro v. Reina*, 495 U.S. 676, 680 n.1 (1990); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987). Repeatedly, this Court has tied the rules governing state and tribal authority in "Indian country" to § 1151's definition.[7] Likewise, Congress has

---

[7] *See, e.g.*, *DeCoteau*, 420 U.S. at 428-30 (state civil adjudicatory and criminal authority over Indians); *Venetie*, 522 U.S. at 525 (tribal tax authority over non-Indians); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 511 (1991) (state tax authority over Indian-to-Indian sales); *McClanahan*, 411

incorporated § 1151's definition of "Indian country" throughout the U.S. Code.[8]

With § 1151(a) so pivotal, grave uncertainty would result from a holding that reopened the settled law that all federal reservations are "under the jurisdiction of the United States Government." *Supra* 17-19; *Mattz*, 412 U.S. at 483 n.1, 506. On many reservations, Congress has removed core aspects of federal jurisdiction—including in Public Law 280, which grants certain States criminal and civil jurisdiction that is *exclusive* of federal

---

U.S. at 165 (state tax authority over Indian incomes).

[8] 6 U.S.C. § 601 (homeland security grants); 10 U.S.C. § 284 (counterdrug activities); 15 U.S.C. § 375 (cigarette taxes); 15 U.S.C. § 632 (ranching and agricultural small businesses); 15 U.S.C. § 1175 (gambling devices); 15 U.S.C. § 1243 (switch knives); 15 U.S.C. § 1245 (ballistic knives); 16 U.S.C. § 3371 (transportation of fish, wildlife, or plants); 18 U.S.C. § 1164 (destruction of reservation boundary signs); 18 U.S.C. § 1460 (obscene matter); 18 U.S.C. § 2252 (sexual exploitation of minors); 18 U.S.C. § 2266 (tribal protection orders); 18 U.S.C. § 2346 (civil suits regarding tobacco sales); 25 U.S.C. § 1304 (VAWA jurisdiction); 25 U.S.C. § 1616e-1 (grants for Indian Health Service clinics); 25 U.S.C. § 1903 (Indian Child Welfare Act); 25 U.S.C. §§ 2801-2802 (assistance for tribal law enforcement); 25 U.S.C. §§ 2801, 2804 (aid in enforcing tribal criminal law); 25 U.S.C. § 3202 (child-abuse reporting); 25 U.S.C. § 4303 (assistance for Native American businesses); 28 U.S.C. § 1442 (federal-officer removal); 28 U.S.C. § 1738B (child support orders); 33 U.S.C. § 1377 (sewage treatment projects); 33 U.S.C. § 2269 (water resources development projects); 34 U.S.C. §§ 12291, 12511 (sexual-assault services); 42 U.S.C. § 608 (TANF assistance); 42 U.S.C. § 6945 (coal combustion residuals units); 42 U.S.C. §§ 10101, 10137-10138 (radioactive-waste repositories); 49 U.S.C. § 40128 (flights over national parks). Many state and tribal laws also incorporate § 1151.

authority. 18 U.S.C. § 1162(c). Are such reservations still "under the jurisdiction of the United States Government"? If not, does that jurisdiction reappear if the State "retrocedes" (*i.e.*, gives back) its jurisdiction, 25 U.S.C. § 1323, or if the federal government reassumes jurisdiction, 18 U.S.C. § 1162(d)? Does it matter *how much* criminal jurisdiction the federal government receives back? *Cf. Morris v. Tanner*, 288 F. Supp. 2d 1133, 1138 (D. Mont. 2003) (retrocession of misdemeanor offenses). What about other transfers of jurisdiction, as in Maine—broader than Public Law 280's in some respects, narrower in others? Act of Oct. 10, 1980, §§ 3, 6, 94 Stat. 1785. Alternatively, what about the many reservations mistakenly thought disestablished, where federal authority was long unexercised? *E.g.*, *Nebraska v. Parker*, 136 S. Ct. 1072, 1081-82 (2016). These questions and more would spur a stampede of litigation nationwide. That is reason enough to leave § 1151(a) alone.

## CONCLUSION

The Tenth Circuit's judgment should be affirmed.

Respectfully submitted,

IAN HEATH GERSHENGORN
ZACHARY C. SCHAUF
LEONARD R. POWELL
ANDREW B. CHERRY*
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
igershengorn@jenner.com

PATTI PALMER GHEZZI
*Counsel of Record*
EMMA ROLLS
MICHAEL LIEBERMAN
ASSISTANT FEDERAL PUBLIC DEFENDERS
215 Dean A. McGee
Suite 707
Oklahoma City, OK 73102
(405) 609-5975
patti_p_ghezzi@fd.org

** Admitted only in California, not admitted in the District of Columbia. Practicing under the supervision of the partnership of Jenner & Block LLP.*

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK SUPREME COURT AND APPELLATE CLINIC AT THE UNIVERSITY OF CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637